RECENT CASES.

CARRIERS—DUTY TO CALL OUT STATIONS—A railroad porter induced a passenger to alight at the wrong station, telling her it was her destination. The name of the station had not been called out; it was dark at the time, and she did not discover the mistake until the train had left. *Held:* She could recover against the railroad. Louisville & N. R. Co. v. Myers, 70 So. 186 (Ala. 1915).

It is generally held to be the duty of a carrier to notify its passengers or to have its stations announced as the trains approach. Southern Railroad v. Hobbs, 118 Ga. 227 (1903); Railroad v. Kendrick, 40 Miss. 374 (1866). A failure to notify the passengers or to announce a station is not negligence *per se,* and a failure to comply with this duty will not give rise to a cause of action in favor of a passenger who is in no way misled thereby. Railroad v. Goodyear, 28 Tex. Civ. App. 206 (1902); Railroad v. Hobbs, *supra.* But if a carrier negligently announces as the station to which a passenger is destined, a different station, and the passenger is thereby misled and induced to alight, he may recover damages for such injuries as are the natural consequences of the wrong committed. Railroad v. Hardie, 100 Miss. 132 (1912); Pennsylvania R. Co. v. Aspell, 23 Pa. 147 (1854). It seems that all that is necessary on the carrier's part is to give a reasonable warning or notice which may be presumed to be sufficient to give notice to passengers in the exercise of reasonable care and vigilance on their travels. Mearns v. Railroad, 163 N. Y. 108 (1900).

See also Hooker v. Blair, 155 N. W. 364 (Mich. 1915), annotated in this issue on page 516.

CARRIERS—INJURY TO PASSENGER LEAVING TRAIN BEFORE REACHING STATION BUT AFTER IT HAS BEEN "CALLED"—A brakeman called out the name of the station a train was approaching and then opened the vestibule door. A passenger who thought the train had stopped stepped off and was injured. *Held:* The railroad was not liable. Hooker v. Blair, 155 N. W. 364 (Mich. 1915).

Generally, the announcement of the name of a station is intended to inform the passengers that the train is approaching their destination and is not of itself an invitation to alight, but rather a notice to passengers bound for that station to alight when the train stops. England v. Railroad, 153 Mass. 490 (1891); Payne v. Railroad, 106 Tenn. 167 (1900). The carrier usually is not bound to be on the lookout to prevent passengers jumping off moving trains, when there is no notice, express or implied, of their intention to do so. Morris v. Railroad, 127 La. 445 (1910); Railroad v. Massey, 97 Miss. 794 (1910). The passenger must exercise reasonable care and vigilance in traveling, and it is to be expected that he will be as sensitive as a railroad employee to the fact that a train is in motion or at rest. Mearns v. Railroad, 163 N. Y. 108 (1900). The carrier, however, must be

careful not to invite the passenger to alight in a dangerous or improper place, while the train is in motion, *etc.* The railroad is liable if the passenger, in the exercise of due care and discretion, is misled by the words or conduct of the carrier's servants and is injured thereby. Railroad v. Mullen, 217 Ill. 203 (1905); Railway v. Lucas, 119 Ind. 583 (1889); Hartzig v. Railway, 154 Pa. 364 (1893). The question of the negligence of the carrier and the contributory negligence of the injured is for the jury on all the circumstances of the case. Barry v. Railroad, 172 Mass. 109 (1898); Railroad v. Garcia, 62 Tex. 285 (1884). As to duty to call out stations, see Louisville & N. R. Co. v. Myers, 70 So. 186 (Ala. 1915), annotated in this issue on page 516.

CONSTITUTIONAL LAW—POLICE POWER—PURE FOOD ACT—A dealer in meats was convicted under a statute which made it unlawful for any person to sell sausage which contained cereal in excess of two per cent. *Held:* The restriction was a valid exercise of the police power. People v. Dehn, 115 N. W. 744 (Mich. 1916).

The police power of a state is not limited to regulations for the preservation of good order, or the public health and safety, but may extend to the prevention of fraud and deceit in the sale of articles of food. Armour Packing Co. v. Snyder, 84 Fed. 136 (1897); Plumley v. Massachusetts, 155 U. S. 461 (1894). The word "sausage" is defined by all lexicographers as an article of food composed of meat, salt and spices; and cereals are not recognized generally as an ingredient of pure sausage. St. Louis Packing Co. v. Houston, 215 Fed. 556 (1910); Armour v. Food Commissioner, 159 Mich. 10 (1910). The prohibition of the coloring of oleomargarine has been held to be a valid exercise of the police power, in preventing the deception of the public, rather than for the protection of health. People v. Rotter, 131 Mich. 250 (1902); State v. Packing Co., 124 Iowa 323 (1904). For the same reason it has been held to be a valid exercise of the police power to prohibit the sale of milk, cream and ice cream which contains less than a certain percentage of fat and solids, although the product may be wholesome and sold in its natural state without adulteration. State v. Ice Cream Co., 147 N. W. 201 (Iowa 1914); State v. Campbell, 64 N. H. 402 (1886); State v. Creamery Co., 83 Minn. 284 (1901). The legislature is the sole judge of the necessity and propriety of preventing deception in the sale of the article by appropriate legislation. Powell v. Pennsylvania, 127 U. S. 678 (1887). If the standard prescribed is unreasonable the legislature must correct it, not the courts. People v. Worden, 118 Mich. 604 (1898); People v. Girard, 145 N. Y. 105 (1895).

CONSTITUTIONAL LAW—PROHIBITIVE TAX ON TRADING STAMPS—A statute of Oregon imposed an excise tax of five per cent. on the gross receipts of any person using or furnishing to others trading stamps. *Held:* This tax being obviously intended to inhibit the use of such stamps, the statute was void as a violation of the Fourteenth Amendment. Cottrell v. Sperry & Hutchinson Co., 227 Fed. 256 (1915).

The legality of the trading stamp business has been very generally

affirmed by the courts. State v. Shugart, 138 Ala. 86 (1902); State v. Ramseyer, 73 N. H. 31 (1904); State v. Dodge, 76 Vt. 197 (1904). Therefore it is held almost unanimously that statutes forbidding the use of trading stamps are unconstitutional, as an unwarrantable invasion of the liberty of the citizen and a violation of the Fourteenth Amendment to the Constitution of the United States and similar personal rights clauses in the state constitutions. State v. Caspare, 115 Md. 7 (1911); *Ex Parte* Drexel, 147 Cal. 763 (1905). Nor can the legislature do indirectly what it cannot do directly, by imposing on the business of selling or giving stamps a tax so oppressive as to be prohibitive. Little v. Tanner, 208 Fed. 605 (1913); Sperry & H. Co. v. Owensboro, 151 Ky. 389 (1912). In a small minority of cases, however, the right of the state to regulate or prohibit the trading stamp enterprise is upheld. D. C. v. Kraft, 35 App. D. C. 253 (1910).

CONSTITUTIONAL LAW—TAXATION—EDUCATIONAL INSTITUTIONS—The net income from an office building owned by the board of education of a church conference was employed in the partial support of a non-sectarian college maintained by the conference in another city. A constitutional provision exempted from taxation institutions of education not used for gain, and the income of which is devoted solely to education. *Held:* The property was exempt. Commonwealth v. Board of Education of M. E. Church, 179 S. W. 596 (Ky. 1915).

Where the rent from property owned by an educational institution is applied to the support of the institution, under some provisions such property is exempt from taxation, Northampton County v. Lafayette College, 128 Pa. 132 (1889); Scott v. St. Johnsburg Academy, 84 Atl. 567 (Vt. 1912), while under others the property to be exempt must be used and appropriated for the distinctive educational purposes. Monticello Seminary v. Board, *etc.*, of Madison County, 249 Ill. 481 (1911); Stahl v. Kansas Educational Ass'n, *etc.*, 54 Kan. 542 (1895); Burr v. City of Boston, 209 Mass. 18 (1911). Property of a fraternity, although built on a college campus, has been held not exempt, Phi Beta Epsilon Corp. v. Boston, 182 Mass. 457 (1903); Inhabitants of Orono v. Kappa Sigma Society, 80 Atl. 831 (Me. 1911), but it has been held otherwise where the building is used as a literary hall and dormitory. Kappa Kappa Gamma House Ass'n v. Pearcy, 92 Kan. 1020, 52 L. R. A. (N. S.) 995 (1914).

Instances of property within the exemption are the following: Dormitories and dining halls of the institution, Yale Univ. v. New Haven, 71 Conn. 316 (1899); the residence of a professor owned by a college and occupied free of rent, Harvard College v. Assessors, 175 Mass. 145 (1900); a college building in a room of which a store is conducted for the benefit of the athletic association, Mercersburg College v. Mercersburg Borough, 53 Pa. Super. Ct. 388 (1913); a laundry, waterworks system, and hotel used as adjuncts to a college, Com. v. Berea College, 149 Ky. 95 (1912); a clubhouse used by students and alumni for recreation and social purposes. Chicago v. Univ. of Chicago, 228 Ill. 605, 10 Am. Cas. 669 (1907).

Examples of property held subject to taxation are the following: A dwelling-house on college land rented to one not an employee of the college, Amherst College v. Assessors, 193 Mass. 168 (1906); a house on land of the institution, occupied by a professor as a dwelling and not for "literary purposes," Kendrick v. Farquhar, 8 Ohio 189 (1837); lands used for agricultural purposes, and a water-pumping station for revenue, Kenyon College v. Schnebly, 31 Ohio Cir. Ct. 150 (1909); buildings of schools for teaching dancing, riding, *etc.*, People v. Deutsche, *etc.*, Gemeinde, 249 Ill. 132 (1911); a garden, the produce of which was used by the students, St. Bridget Convent Corporation v. Town of Milford, 87 Conn. 474 (1913).

CONTRACTS—CERTAINTY—SPECIFIC PERFORMANCE—In contracting for the sale of motion picture rights the negotiations, which consisted of an exchange of telegrams, showed that no mention had been made of matters vital to both parties. *Held:* Specific performance cannot be granted. Davis v. Epoch Producing Corp., 155 N. Y. S. 597 (1915).

It is well settled that specific performance of a contract will not be decreed unless the contract contains all material terms. Huff v. Shepherd, 58 Mo. 242 (1874); Mayer v. McCreery, 119 N. Y. 434 (1890). Moreover, it is essential that such material terms of the contract be certain, exact, and unequivocal. Walcott v. Watson, 53 Fed. 429 (1892); Ham v. Johnson, 55 Minn. 115 (1893); Brown v. Brown, 33 N. J. Eq. 650 (1881). It is also necessary that the parties be positively designated by the contract. Los Angeles Land Assn. v. Phillips, 56 Cal. 539 (1880); Stanton v. Miller, 58 N. Y. 192 (1874). If the price is not fixed by the agreement or the means provided for ascertaining the price with certainty, the contract would be plainly incomplete and could not be enforced. Blogden v. Bradbear, 12 Ves. 466 (Eng. 1806); Williams v. Morris, 95 U. S. 444 (1877); Trustees v. Bigelow, 16 Wend. 28 (N. Y. 1836). While it is the settled rule that equity will not grant specific performance where the price is to be determined by arbitrators and where the award has not been made, Milnes v. Gery, 14 Ves. 400 (Eng. 1807); Noyes v. Marsh, 123 Mass. 286 (1877); still if such award is not one of the essential terms, but relates only to minor details that might arise, the decree will be granted. Union Pacific Ry. v. Chicago, *etc.*, Rwy. 51 Fed. 309 (1892); Coles v. Peck, 96 Ind. 333 (1884). The doctrine that performance will not be decreed unless the contract is complete and certain is applied more strictly against the representatives and assignees of the original contracting parties than against the parties themselves. 1 How. 499 (Miss. 1837); Odell v. Morin, 5 Ore. 96 (1873). If a written contract contains all the material terms, it may be specifically enforced though indefinite on its face, provided the court can supply the necessary exactness by reference made therein to other documents or by admissible parol evidence. Fowler v. Fowler, 204 Ill. 82 (1903); Pratter v. Miller, 10 N. C. 628 (1825); Peay v. Seigler, 48 S. C. 496 (1896).

As is pointed out in the principal case, a decree will not be granted where specific performance is impossible or where it would subserve no useful purpose. Kennedy v. Hazleton, 128 U. S. 667 (1888); Werden v. Graham,

128 U. S. 667 (1888); Rommel v. Summit Coal Co., 18 Super. Ct. 482 (Pa. 1901). However, where the contract is divisible, specific performance may be granted for part and compensation awarded for the breach of the other part. United States v. Alexandria, 19 Fed. 609 (1882); Adams v. Messinger, 147 Mass. 185 (1888). It is pointed out in the principal case that it is not a ground for refusing specific performance that a formal contract was not executed. Such a view logically follows from the rule prevailing in a majority of states that if a complete contract has been entered into, it is none the less binding because it was understood between the parties that the agreement should later be formally reduced to writing and executed. Sanders v. Pottlitzer Fruit Co., 144 N. Y. 209 (1894); Blaney v. Hoke, 14 Ohio St. 292 (1863); Cohn v. Plumer, 88 Wis. 622 (1894).

CONTRACTS—COVENANTS IN RESTRAINT OF TRADE—A corporation, the trade of which had extended into a large number of states and into Canada, upon selling one branch of its business with the machinery and good will, covenanted not again to go into the manufacture of the articles embraced in that branch of its business. *Held:* The covenant was valid. Hall Mfg. Co. v. Western Steel & Iron Works, 227 Fed. 588 (1915).

Whether a covenant in restraint of trade be general or particular, its validity, under the modern doctrine, is tested by determining whether, on the facts of the particular case, it is reasonable, Nordenfelt v. Maxim Nordenfelt Gun Co. (1894), App. Cas. 535 (Eng.); Standard Oil Co. v. United States, 221 U. S. 1 (1910); and is supported by a valid consideration. Hubbard v. Miller, 27 Mich. 15 (1873); Cleaver v. Lenhart, 182 Pa. 285 (1897). Tested by the rule of reason, a restrictive covenant is not necessarily valid because it is limited in time and place. Consumers' Oil Co. v. Nunneaker, 142 Ind. 560 (1895); Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596 (1898). If injury to the public outweighs the public policies of honesty and freedom of alienation, the restrictive covenant will not be enforced. Stewart v. Stearns, *etc.*, Lumber Co., 56 Fla. 570, 649 (1908); Nester v. Continental Brewing Co., 161 Pa. 473 (1894). By the same rule of reason a restrictive covenant is not necessarily invalid because it is unlimited in time, Foss v. Roby, 195 Mass. 292 (1907); Southworth v. Davidson, 106 Minn. 119 (1908); in place, Electric Co. v. Hawkes, 171 Mass. 101 (1898); or, in both time and place. Prame v. Ferrell, 166 Fed. 702 (1909); United Shoe Machinery Co. v. Kimball, 193 Mass. 351 (1907). As a general rule, however, contracts in restraint of trade unlimited as to both time and place, are held void as against public policy. Ryan v. Hamilton, 205 Ill. 191 (1903); Tecktonius v. Scott, 110 Wis. 441 (1901). In determining the validity of the restraint the nature of the business is of importance. Garst v. Harris, 177 Mass. 72 (1900); Tode v. Gross, 127 N. Y. 480 (1891). The restrictive covenant must be incidental or ancillary to the main purpose of securing to the covenantee the protection needed by him. Harris v. Thues, 149 Ala. 133, 204 (1907); Harbinson-Walker Co. v. Stanton, 227 Pa. 55 (1910).

CORPORATIONS—DIVIDENDS—RIGHT OF STOCKHOLDER TO COMPEL DISTRIBUTION—A corporation had not declared a dividend though it had received net

proceeds to a large amount and despite the stipulation in its certificates that preferred stockholders should receive an annual cumulative dividend. A preferred stockholder brought a bill in equity to compel distribution. *Held:* An order should be entered compelling the corporation to declare a dividend. Lee v. Fisk, 109 N. E. 833 (Mass. 1915).

The fact that the dividends of a preferred stockholder are in terms guaranteed does not make them payable at all events, as it is well settled that such stockholders are entitled to payment only when there are surplus profits out of which dividends may be lawfully declared. Warren v. King, 108 U. S. 389 (1882); Miller v. Ratterman, 47 Ohio 141 (1890); Taft v. Hartford R. R. Co., 8 R. I. 310 (1866). However, if the preferred stockholders are guaranteed a certain annual dividend, such dividends are cumulative, and if not paid at the end of any one year, they must be paid in subsequent years, before any dividends can be paid on common stock. Lockhart v. Van Alstyne, 31 Mich. 76 (1875); Boardman v. Lake Shore Railway Co., 84 N. Y. 157 (1881). Until a dividend has been actually declared by the directors, the stockholders have no legal right or title to any of the assets, although there is a fund out of which payments might lawfully be made. Phelps v. Farmers Bank, 26 Conn. 269 (1857); American Nail Co. v. Gedge, 96 Ky. 513 (1895). While it is primarily a question for the directors to determine whether the condition of the corporation is such as to warrant the declaration of a dividend, still if they arbitrarily or fraudulently abuse this discretion, a court of equity will compel them to act at the suit of a stockholder. Storrow v. Manufacturing Assn., 87 Fed. 612 (1898); Laurel Land Co. v. Fougeray, 50 N. J. Eq. 756 (1893.)

All of the authorities agree with the principal case on the point that if the directors or other officers of the corporation fraudulently appropriate its property to their own use or otherwise dispose of it, they will be personally liable. Briggs v. Spaulding, 141 U. S. 132 (1891); Commercial Bank v. Chatfield, 121 Mich. 641 (1899); Spering's Appeal, 71 Pa. 11 (1872). In the absence of statute, however, the general rule is that a suit to recover damages for the wrongful act of the director must be brought by the corporation. Hodgson v. Duluth Railway, 46 Minn. 454 (1891); Southwest Gas Co. v. Fayette Company, 145 Pa. 13 (1891). If the corporation refuses to act, the shareholders may do so in their own names, in equity. Slatterty v. St. Louis Co., 91 Mo. 217 (1886); but before they can maintain such bill, they must show, in addition to grievances calling for equitable relief, that an earnest effort was made to have the managing body act. Hawes v. Oakland, 104 U. S. 450 (1881). However, a shareholder may bring a bill in equity, without a previous request to the corporation to do so, if it appears that such request would have been useless or would have been refused. Knoop v. Bohmrick, 49 N. J. Eq. 83 (1891); Dowd v. Wisconsin Railway Co., 65 Wis. 108 (1886).

CORPORATIONS—PLEDGE OF STOCK—DIVIDENDS—Stock was transferred to the plaintiff to hold as collateral security and later the dividends on these shares were paid to the real owner of the stock. *Held:* The plaintiff was

entitled to recover these dividends from the owner of the stock. National Bank of Commerce v. Equitable Trust Co., 227 Fed. 526 (1915).

One who accepts stock as collateral security and causes the same to be transferred to his own name on the corporation books, incurs immediate liability as a stockholder as to creditors. National Bank v. Case, 99 U. S. 628 (1878); Converse v. Paret, 228 Pa. 157 (1910). But where the record shows that the shares were taken as collateral security, the pledgee assumes no liability for debts of the corporation. Beale v. Essex Savings Bank, 67 Fed. 816 (1895); Fields & Co. v. Evans Co., 106 Minn. 85 (1908). With regard to dividends, the general rule undoubtedly is that the pledgee is entitled to receive all dividends during the continuance of the pledge. Brady v. Irby, 142 S. W. 1124 (Ark. 1912); Skinner v. Taft, 140 Mich. 282 (1905); although the parties may agree otherwise by express contract. Guarantee Co. v. Town Co., 96 Ga. 511 (1895). But where the pledgee's interest doesn't appear on the corporation records, the company is justified in paying dividends to the real owner of the stock. Gemmel v. Davis & Co., 75 Md. 546; Brisbane v. D. L. & W. R. R. Co., 25 Hun. 438 (N. Y. 1881). In such a case, however, the pledgor holds the amount of the dividends in trust for the pledgee. Savings Bank v. Marshall, 68 N. H. 417 (1895); Hermann v. Maxwell, 47 Super. Ct. 347 (N. Y. 1881).

If the transfer has been recorded or if the corporation has actual knowledge of the pledge, payment of dividends must be made to the pledgee. Timberlake v. Compress Co., 72 Miss. 323 (1894); Boyd v. Conshohocken Mills, 149 Pa. 363 (1892). And this is true even though the by-laws of the corporation require all transfers to be recorded. National Bank v. Wilder, 32 Neb. 454 (1891). The corporation must pay to the pledgee, although there was no knowledge of a transfer until after a dividend had been declared and passed to the credit of the pledgor. Steel v. Island Milling Co., 47 Ore. 293 (1906). It has been held that it is not wrongful for the pledgee to accept a stock dividend in lieu of a cash dividend. Whitney v. Whitney, 140 N. W. 35 (Wis. 1913). Where large profits have been earned and no dividends declared and where the pledgor is refused permission to examine the books, he may, despite the fact that his stock has been pledged, bring a bill compelling a dividend to be declared. Anderson v. Dyer, 94 Minn. 30 (1904); Booth v. Consolidated Jar Co., 62 Misc. 252 (N. Y. 1909). It is important to note, however, that all dividends received by the pledgee are for the benefit of the pledgor and must be accounted for by the pledgee. Smith v. Quartz Mining Co., 14 Cal. 242 (1859); Reid v. Caldwell, 120 Ga. 718 (1904); Bryson v. Rayner, 25 Md. 424 (1866).

CRIMINAL LAW—FORMER JEOPARDY—A prisoner was indicted on a charge of murder, and pleaded not guilty. Before a jury could be impaneled, a *nolle prosequi* was entered, and the prisoner was discharged without bail. In a subsequent trial for the same offense, the defendant pleaded former jeopardy. *Held:* The defendant was never in jeopardy. State v. Smith, 87 S. E. 98 (N. C. 1915).

It is a universally accepted principle of the common law that no person

shall be placed in jeopardy more than once for the same offense. 4 Bl. Comm. 330; Williams v. Com., 78 Ky. 93 (1879). The doctrine has been embodied in the federal and state constitutions. But it is not to be invoked by one who by his own conduct has made it impossible for a valid verdict or judgment to be rendered against him. People v. Higgins, 59 Col. 357 (1881). So also where the defendant consents to the discharge of the jury after a void or defective verdict, he cannot plead former jeopardy. People v. Kern, 8 Utah 268 (1892).

The great weight of authority is that jeopardy does not arise until after the jury is duly impaneled and sworn. 1 Wharton Crim. Law (11th Ed.) 517; Alexander v. Com., 105 Pa. 1 (1884). Nor does *nolle prosequi* amount to an acquittal, except where it is entered after the prisoner's jeopardy has begun. U. S. v. Farring, 4 Cranch C. C. 465 (1832). In every case the action must be taken by one having proper authority. A discharge by an examining magistrate, police magistrate, or any court without jurisdiction is no bar to a subsequent trial by a court having jurisdiction. Com. v. Goddard, 13 Mass. 455 (1816).

EQUITY JURISDICTION—CANCELLATION OF INSTRUMENTS—*Laches*—After making a conveyance of land to the grantee upon the latter's promise to support her, the grantor lived with the grantee for sixteen years, at the end of which period she removed from the grantee's household and then brought an action to obtain the cancellation of the deed. *Held:* The grantor's right of action was barred because of *laches*. Saper v. Cisco, 95 Atl. 1016 (N. J. 1915).

Proceedings for the cancellation of an instrument must be begun promptly as an unwarranted delay will bar all rights of the complainant. Goree v. Clements, 94 Ala. 337 (1891); Appeal of Hewitt, 55 Md. 509 (1881). In such cases equity is not bound by the Statute of Limitations, but decides upon the facts of each case whether there has been due diligence in seeking relief. Mattlock v. Todd, 25 Ind. 128 (1865); Pussey v. Gardner, 21 W. Va. 469 (1883); although equity frequently adopts a period similar to that set forth in the statute of limitations. Askhew v. Hooper, 28 Ala. 634 (1856); McCann v. Welch, 106 Wis. 142 (1900). However, mere delay, especially if there is no change in the situation of the parties, will not deprive the defrauded party of his remedy so long as he remains ignorant of the fraud. Bishop v. Thompson, 196 Ill. 206 (1902); Manning v. Mulrey, 192 Mass. 547 (1906). But if the fraud could have been discovered by reasonable diligence, the party is bound as though he had knowledge. Davis v. Harper, 23 Ind. 567 (1864); Wood v. Jones, 87 Ky. 511 (1888). The rule in New York, however, is that the defrauded party owes no duty of active vigilance in discovering the fraud. Baker v. Lever, 67 N. Y. 304 (1876).

The heirs or devisees of a testator from whom third persons fraudulently have obtained a deed are not chargeable with *laches* until the land has actually descended to them. Ring v. Lawless, 190 Ill. 520 (1901); Hemphill v. Halford, 88 Mich. 293 (1891). A person will not be barred by *laches* in a suit to obtain cancellation where such suit is begun immediately after the

termination of an unsuccessful suit for reformation of the instrument. Russel v. Russel, 129 Fed. 434 (1904). The fact that the grantor takes no steps for several years does not estop him from maintaining an action on the ground that there was no valid delivery. O'Conner v. O'Conner, 100 Iowa 476 (1896). *Laches* will not bar an action where after the deed was fraudulently obtained the grantor remained in possession and when at all times the grantee recognized the grantor as having a valid title to the property. Treadwell v. Torbet, 122 Ala. 297 (1898); Case v. Case, 26 Mich. 484 (1873).

Equity is reluctant to excuse delay in those cases where as a result of the delay the party sought to be charged with fraud has had his means of defense impaired by the death, insanity, or loss of memory of disinterested witnesses. Mann v. Laufer, 4 Ky. Law Rep. 348 (1882); Lutzen v. Lutzen, 64 N. J. Eq. 773 (1902); McCann v. Welch, 106 Wis. 142 (1900).

EQUITY JURISDICTION—SPECIFIC PERFORMANCE—AGREEMENT TO GIVE INDEMNITY BOND—A bill was filed to enforce an agreement to give a bond with surety for the faithful performance of a contract. *Held:* The contract should be specifically performed. Bosch Magneto Co. v. Rushmore, 95 Atl. 614 (N. J. 1915).

Equity will enforce an agreement to give indemnity on the ground of the inadequacy of a remedy at law. Chamberlain v. Blue, 6 Blackf. 491 (Ind. 1843); Wilson v. Davidson County, 3 Tenn. Ch. 536 (1877); Hicks v. Turck, 72 Mich. 311 (1888). The general rule is that the agreement will be enforced where the specified thing or act contracted for, and not mere pecuniary compensation, is the redress practically required. Irvine v. Armstrong, 31 Minn. 216 (1883); Rothholz v. Schwartz, 46 N. J. Eq. 477 (1890). So equity compels the giving of a realty mortgage as security. Lowe v. Walker, 77 Ark. 103 (1905); Speer v. Allen, 135 S. W. 231 (Tex. 1911); also chattel mortgages. Williamson v. New Jersey S. R. Co., 26 N. J. Eq. 398 (1875); Ryan v. Donley, 69 Neb. 623 (1903). Specific performance will also be decreed in contracts for the assignment of accounts as collateral security. Preston Bank v. Purifier Co., 84 Mich. 364 (1890); Central Trust Co. v. Louisville Trust Co., 87 Fed. 23 (1898). A contract to pledge real and personal property has likewise been upheld. Morris v. McCutcheon, 213 Pa. 349 (1906).

EVIDENCE—ADMISSIBILITY OF SKIAGRAPHS—In an action for personal injuries, skiagraphs showing the injuries to plaintiff's leg, which are identified as having been taken by surgeons by means of X-ray apparatus, may be received in evidence. Ingebretsen v. Minn., *etc.*, R. Co., 155 N. W. 327 (Iowa 1915).

Photographs are admitted in evidence when the proper preliminary proof as to their exactness and accuracy is offered. Cincinnati R. Co. v. De Onzo, 100 N. E. 320 (Ohio 1912); Beardslee v. Columbia Township, 188 Pa. 496 (1898); see also 61 UNIV. OF PENNA. L. REV. 337. Because of their novelty, the courts were for a time slow to admit skiagraphs in evidence except upon minute proof of their scientific accuracy, but there is now no distinction between an X-ray and a common photograph. Miller v. Dumon, 24 Wash. 648 (1901); Dean v. Wabash R. Co., 229 Mo. 425 (1910). The skiagraph

must, of course, be identified as truly representing the object it is claimed to represent. Lake Shore Ry. v. Hobart, 32 Ohio C. C. 154 (1911). It is admissible when properly authenticated by a qualified physician. Doyle v. Singer Co., 220 Mass. 327 (1915). Testimony of the physician who took the picture, or was present at its taking, as to his experience and competency, and that it is a correct representation, is *prima facie* sufficient to admit the skiagraph. Krauss v. Ballinger, 171 Ill. App. 534 (1913); Marion v. Construction Co., 141 N. Y. S. 647 (1913). However, wide discretion is exercised by the courts as to the sufficiency of the preliminary proof. The skiagraph must first be proved to be an accurate representation. Ligon v. Allen, 157 Ky. 101 (1914). When this is once proved, some courts have held that an omission to show that the medical expert was familiar with X-ray photography, Kimball v. Electric Co., 159 Cal. 225 (1911), or that the condition of the apparatus was such as to insure a perfect picture, Carlson v. Benton, 66 Neb. 486 (1902), was not prejudicial error. But the discretion of the trial judge is not to be exercised arbitrarily, and to exclude an X-ray photograph when there is uncontradicted evidence of three surgeons of its accuracy has been held an abuse of discretion. Carlson v. Benton, *supra*.

EVIDENCE—PREVIOUS OFFENSES—In an action against one charged with indecently exposing his person, evidence was offered of similar acts of the accused toward the complainant a few weeks before the offense charged; also of similar conduct on his part toward third persons. *Held:* The former evidence was admissible; the latter was not. Perkins v. Jeffrey, 113 L. T. 456 (Eng. 1915).

The general rule is that where a party is accused of a particular offense, evidence of the commission of another distinct offense, disconnected with the crime charged is inadmissible. Rex v. Fisher, 102 L. T. 111 (1910). Where the criminal act is denied, the admission of such evidence can be sustained only if the former act is part of the *res gestae*. Vincent v. State, 55 S. W. 819 (Tex. 1900); or if it is part of a general system or scheme. Cooke v. Moore, 11 Cush. 213 (Mass. 1853). Where the criminal act is admitted, but the criminal intent is denied, evidence of previous acts is admissible to show such criminal intent, or knowledge, malice or motive, or to rebut the defence of accident or mistake. Reg. v. Francis, 30 L. T. 503 (1874); State v. Lapage, 57 N. H. 245, 294 (1876). For a statement of the rule, see 62 UNIV. OF PENNA. LAW REV. 225, and for a discussion of the rule, see 61 UNIV. OF PENNA. LAW REV. 319. In some cases such evidence has been admitted though coming within none of the recognized exceptions. People v. Fultz, 41 Pac. 1040 (Cal. 1895); State v. Hummer, 62 Atl. 388 (N. J. 1905). If such evidence is otherwise admissible the mere fact that it tends to show criminal conduct on the part of the accused, will not exclude it. Maken v. Atty.-Gen. of New South Wales, 69 L. T. 778 (1894). Nor is it rendered inadmissible by the acquittal of the accused of the former offense. McCartney v. State, 3 Ind. 353 (1852). As to what are similar offenses, is left largely to the discretion of the trial court; and the decisions are in hopeless confusion. 1 Wigmore on Evidence, 302.

EVIDENCE—PROOF OF NEGLIGENCE—CUSTOMARY USAGE—In an action by an employee for damages sustained from a defective machine, the employer offered proof that the machine was the kind customarily used by other firms in the same business. *Held:* This could be rebutted by proof that the machine was obviously inherently dangerous. Sanford Iron Works v. Moore, 179 S. W. 373 (Tenn. 1915).

The rule of this case, that proof of conformity to customary usage makes a *prima facie* case of non-liability, is the English rule and is supported by the weight of authority in America. Bleckiner v. Gas Co., 3 L. T. 317 (Eng. 1860); Martin v. California Rwy., 94 Cal. 326 (1892); Nyback v. Lumber Co., 109 Fed. 732 (1901); Siverson v. Genks, 192 N. Y. S. 382 (1905). But there is substantial authority *contra,* holding that an employer who adopts a machine in common use is free from negligence. Chrisimer v. Bell Telephone Co., 194 Mo. 189 (1905); Shadford v. Ann Arbor Rwy., 111 Mich. 390 (1892); Titus v. Rwy., 136 Pa. 618 (1890). Under this view it is error to submit the question of negligence to the jury when the employer has proven that the machine was the kind customarily used. Central Rwy. v. Ray, 129 Ga. 349 (1907); Panza v. Lehigh Coal Co., 231 Pa. 577 (1911). But where the evidence as to what is customary is conflicting the question of negligence is then one for the jury. Shadford v. Rwy., 121 Mich. 224 (1899).

The rule is limited in most jurisdictions to instrumentalities and does not apply to the methods used. Rwy. v. Burton, 97 Ala. 240 (1892). But see *contra,* Coal Co. v. Hayes, 128 Pa. 294 (1889). The doctrine, of course, is only applicable when the instrument is in good repair. Dean v. Woodenware Co., 106 Mo. App. 167 (1904). It is not applicable where the negligence charged is in breach of a statute. Jones v. Caramel Co., 225 Pa. 644 (1909). But evidence that an employer did not use the customary appliances is not conclusive evidence that he was negligent. Cunningham v. Bridge Works, 197 Pa. 625 (1901); Kunz v. Stuart, 1 Daly 431 (N. Y. 1865). But even under the rule of the principal case while evidence of the conformity to customary usage is not conclusive, it must be admitted. Baird v. Reilly, 35 C. C. A. 78 (1899), and it is an error to refuse to allow either the employer or the employee to give evidence showing what the customary usages of the trade were. Thayer v. Coal Co., 121 Ia. 121 (1903).

LANDLORD AND TENANT—DEFECTIVE CONDITION OF PREMISES—GILL V. MIDDLETON RESTRICTED—A landlord who was under no obligation to repair, gratuitously undertook the repair of a handrail on the porch steps. The negligent performance thereof caused injury to the tenant's invitee. *Held:* The landlord was not liable to any one except the other party to the contract and hence owed no duty to the tenant's invitee. Thomas v. Lane, 109 N. E. 363 (Mass. 1915).

The rule is that if one makes a gratuitous engagement and actually enters upon the execution of the business and performs negligently by which damages ensues to the other party, an action will lie for such misfeasance. Balfe v. West, 13 C. B. 466 (Eng. 1853); Thorne v. Deas, 4 Johns. 96 (N. Y. 1809). This has been applied to the relationship of landlord and tenant where

the former has gratuitously undertaken repairs. Gill v. Middleton, 105 Mass. 477 (1870); Shute v. Bills, 191 Mass. 433 (1906). It has been pointed out that this is entirely distinct from any question of liability for damages by reason of a failure to make repairs. Rehder v. Miller, 35 Pa. Super. Ct. 344 (1908). The landlord may have undertaken the repair work as a favor to the tenant. Aldag v. Ott, 28 Ind. App. 542 (1902); or he may, as owner, have been required to do so by the city, Little v. McAdaras, 38 Mo. App. 187 (1889); or he might have torn up the premises solely for a purpose of his own. O'Dwyer v. O'Brien, 13 N. Y. App. Div. 570 (1897).

The decision in the principal case raises the question of its effect on the doctrine of Gill v. Middleton, *supra*. The court endeavors to make a distinction by restricting the earlier case to recovery only by the tenant. At any rate, the principal case seems to disregard the line of cases of its own jurisdiction, which seem to have gone further than others in extending the landlord's liability to other users than the actual tenant himself. In Shute v. Bills, *supra*, the daughter of the tenant was plaintiff and in Toomey v. Sanborn, *supra*, a necessary user of the premises recovered. In Gill v. Middleton the tenant's wife was held to have an action against the landlord.

A case squarely in accord with the principal case is Malone v. Laskey, L. R. 2 K. B. 141 (Eng. 1907), where it was held there was no contractual relation, that the work done amounted only to an innocent representation and gave the injured wife of a sub-tenant's employee no cause of action.

MALICIOUS PROSECUTION—TERMINATION OF THE PROSECUTION—The defendant caused a warrant to be issued for the plaintiff charging him with false pretense, but the prosecution was terminated by the order of the justice's court. *Held:* This was a sufficient termination to found the action. Hadley v. Tinnin, 86 S. E. 1017 (N. C. 1915).

The termination of the previous proceedings in an action for malicious prosecution must be of such a character as fairly to imply lack of reasonable grounds for the prosecution. The earlier English cases required a determination on the merits in the favor of the plaintiff in the second suit. Goddard v. Smith, 6 Mod. 261 (1704), and there was *dicta* to the same effect in earlier American cases. Monroe v. Maples, 1 Root 553 (Conn. 1793). But this is not the rule of the later decisions. Wyatt v. White, 291 L. J. Ex. 193 (Eng. 1860). It is sufficient if the accused is discharged by a court having jurisdiction. Rider v. Kite, 61 N. J. L. 8 (1897); Mentel v. Hippely, 165 Pa. 558 (1895), even though without a hearing on the merits. McDonald v. National Art Co., 125 N. Y. Supp. 708 (1910). However, no action lies if discharged illegally. Will v. Egan, 160 Pa. 719 (1894). It is sufficient if the accused is discharged after the indictment has been quashed. Reit v. Meyer, 160 N. Y. App. Div. 752 (1914), or after the grand jury has ignored the indictment. Graves v. Dawson, 130 Mass. 78 (1881). But *aliter* when there has been no discharge by order of the court. Weisner v. Hansen, 81 N. J. L. 601 (1911). So there is a sufficient termination if the prosecutor abandons the prosecution. Beemer v. Beemer, 9 Ont. L. R. 69 (1904), or if a *nolle prosequi* is entered even though the court still has jurisdiction to set it

aside. Banken v. Locke, 136 La. 155 (1915); Scheibler v. Sternberg, 129 Tenn. 614 (1914). Hence if there is a discharge after *habeas corpus* proceedings and the prosecution is then abandoned, it is sufficient. McKinnan v. McLaughlin Carriage Co., 37 New Brunswick 3 (1904); Holliday v. Holliday, 123 Cal. 26 (1898), *contra.*

But a termination of the criminal proceeding by the procurement of the party prosecuted is not a sufficient termination to found an action for malicious prosecution. Ruhl Bros. Brewing Co. v. Atlas Brewing Co., 187 Ill. App. 392 (1915), nor when the termination was brought about by way of compromise, for there is no presumption that the action was groundless. Waters v. Winn, 82 S. E. 537 (Ga. 1914). The same rules apply to actions for the malicious prosecution of civil actions. Bonney v. King, 103 Ill. App. 601 (1902); Wilson v. Hale, 178 Mass. 111 (1901).

NUISANCE—COUNTY HOSPITAL FOR TUBERCULAR PATIENTS—A county erected a hospital for tubercular patients on its own land with the approval of the State Board of Health. No danger to the health of the community existed or could be apprehended. *Held:* Depreciation in the market value of adjacent land was not ground for an injunction. City of Northfield v. Atlantic County, 95 Atl. 745 (N. J. 1915).

In order to create a nuisance from the use of property, the use must be such as to work a tangible injury to the person or property of another, or render the enjoyment of property essentially uncomfortable. Wood on Nuisances (2d Ed.), § 3. A hospital is not a nuisance *per se.* Deaconess Hospital v. Bontyes, 207 Ill. 553 (1904); Board of Health v. Trenton, 63 Atl. 897 (N. J. 1906). Nor is a pest-house a nuisance *per se,* although if it is carelessly or negligently carried on, it may then be enjoined. City of Lorain v. Rolling, 24 Ohio C. C. 82 (1902). The maintenance of a tuberculosis hospital in a thickly populated section of a city may, however, be enjoined. Cherry v. Williams, 147 N. C. 452 (1908); Everett v. Paschall, 61 Wash. 47 (1910). A hospital may be enjoined from using an operating room in close proximity to an adjoining owner's windows, and its status as a charitable institution is no defense. Kestner v. Hospital, 245 Pa. 326 (1914). But if a hospital or pest-house is properly located and is conducted without negligence, it is not a nuisance and an adjacent owner whose land has depreciated in value has no remedy. Barry v. Smith, 191 Mass. 78 (1906); Frazer v. City of Chicago, 186 Ill. 481 (1900). The same is true of a cemetery. Elliott v. Ferguson, 37 Tex. Civ. App. 40 (1904); Harper v. City of Nashville, 136 Ga. 141 (1911).

PROPERTY—CONVERSION—SPECIFIC PERFORMANCE—A lessor agreed to sell an estate to the lessees upon the happening of a condition. *Held:* The lessor's devisee acquired an estate in fee, defeasible on fulfilment of the condition. *Re* Marlay, 113 L. T. 433 (Eng. 1915).

In deeds and other instruments *inter vivos,* conversion takes place as from the date of their execution. Wheless v. Wheless, 92 Tenn. 293 (1893). Where the lessee has an option to purchase, and exercises his option after

the death of the lessor, the realty is converted retrospectively, as between those claiming under the vendor, the proceeds going to the personal representative rather than to the heir or devisee. Lawes v. Bennett, 1 Cox 167 (Eng. 1785); Collingwood v. Row, 26 L. J. N. S. 649 (Eng. 1857). The English rule, Lawes v. Bennett, *supra,* while consistently followed in England, has been severely criticized in all subsequent decisions. It has been generally adopted in America. Waterworks Co. v. Sisson, 18 R. I. 411 (1896); Kerr v. Day, 14 Pa. 112 (1850), though some courts repudiate it. Smith v. Loewenstein, 50 Ohio St. 346 (1893); Lime Co. v. Leary, 203 N. Y. 469 (1911).

Many qualifications of the general rule are found. Until the option is exercised the heir or devisee will be entitled to the rents. *Ex parte* Hardy, 30 Beav. 206 (Eng. 1861); *In re* Isaacs, L. R. (1894), 3 Ch. 506 (Eng.). The conversion will not relate back so as to dissolve an attachment levied on the land as that of the grantor. Sheehy v. Scott, 128 Iowa 551 (1905). Where part of the property is destroyed prior to the declaration of the option, the conversion does not relate back so as to entitle the vendee to the insurance money. Gilbert v. Port, 28 Ohio St. 276 (1876); Caldwell v. Frazier, 68 Pac. 1076 (Kan. 1902). See also People's Rwy. Co. v. Spencer, 156 Pa. 85 (1893). Moreover, the doctrine of Lawes v. Bennett is distinguished wherever possible so as to favor the heir or devisee, as where the will contains an express stipulation. Drant v. Vause, 11 L. J. Ch. N. S. 170 (Eng. 1842). It does not apply as between the vendor and the vendee themselves. Edwards v. West, L. R. 7 Ch. Div. 858 (Eng. 1876).

PROPERTY—OBSTRUCTION OF PUBLIC ROAD—RIGHTS OF OWNER OF FEE—A huckster sold fruit from his wagon which stood on a public road. The owner of the fee of the road ordered him to move on, and when he refused, put him off forcibly. In an action for assault and battery the defendant pleaded the ownership of the fee. *Held:* While owning the fee the possession was not exclusive, the plaintiff's use was not an additional burden, and the owner of the fee was not justified in using force. Hart v. Jones, 70 So. 206 (Ala. 1915).

It is generally the law, that where the abutting owner does own the fee of the street he has all the usual rights of ownership, subject to a public easement. Huffman v. State, 21 Ind. App. 449 (1898); Angell, Highways, § 319; 2 Elliott, Roads and Streets, § 896; 3 Kent's Com., p. 432. The public's only right is one of passage. Huffman v. State, *supra*; Adams v. Rivers, 11 Barb. 390 (N. Y. 1851). Anyone committing violence on a public road or using it as a market or habitual standing place, is generally considered a trespasser as to the owner of the fee, having exceeded the right of passage, and may be dealt with as such, contrary to the principal case. McDonald v. City of Newark, 42 N. J. Eq. 136 (1886); Adams v. Rivers, *supra;* State v. Buckner, Phillips 558 (N. C. 1868). And the owner of the fee would be entitled to use reasonable force in expelling such a trespasser. Hannabalson v. Sessions, 116 Ia. 457 (1902); Gyre v. Culver, 47 Barb. 592 (N. Y. 1867); Souter v. Codman, 14 R. I. 119 (1883).

PROPERTY—RULE AGAINST PERPETUITIES—A testator devised his estate in trust for his children for their lives, remainder in fee to his grandchildren,

possession being postponed until majority of the youngest grandchild. *Held:* The trust did not violate the rule against perpetuities. Dorrance v. Dorrance, 227 Fed. 679 (1915).

No future interest in property may be created which will not vest within twenty-one years after lives in being. Eaton v. Eaton, 88 Conn. 269 (1914); Gambrill v. Gambrill, 122 Md. 563 (1914); Merkel v. Capone, 81 N. J. Eq. 282 (1913). This rule deals only with the actual vesting of the title, so that it is not violated if the actual possession is deferred. Grady v. Whittemore, 192 Mass. 367 (1906); Kountz's Estate, 213 Pa. 390 (1906); Salisbury v. Salisbury, 92 Kan. 644 (1914). But it is essential that the legal estate not only may, but must necessarily, vest within the prescribed period. Bates v. Spooner, 75 Conn. 501 (1903); Asylum v. Lefebre, 69 N. H. 238 (1898); Barton v. Thaw, 246 Pa. 348 (1914).

A trust created for charitable or public purposes is not subject to similar limitations. Ingraham v. Ingraham, 169 Ill. 432 (1897). But charitable donations, if contingent and executory, form no exception to the rule against perpetuities. Booth v. Church, 126 N. Y. 215 (1891); Russell v. Girard Trust Co., 171 Fed. 161 (1909). If, however, the gift for charitable purposes is immediate, it is valid, though the application of the fund may be uncertain. Philadelphia v. Girard, 45 Pa. 9 (1863).

SALES—CONTINUING WARRANTY—BREACH—Bond brokers warranted a bond to be a first mortgage bond, well secured and a safe investment. After three years a default in interest occurred and the mortgaged property was sold under foreclosure proceedings. *Held:* The warranty related to the time of sale, and was not a warranty that the investment would continue safe until the maturity of the bond. Menard v. Thompson & Sons, 96 Atl. 177 (Conn. 1915).

Ordinarily a warranty refers to the state of affairs at the time of sale, Iroquois Furnace Co. v. Wilkin Mfg. Co., 77 Ill. App. 59 (1898); Schuwirth v. Thumma, 66 S. W. 691 (Tex. Civ. App. 1902), and will be so construed in the absence of a clear understanding to the contrary. American Syrup & Preserving Co. v. Roberts, 112 Ind. 18 (1910). But a warranty may extend to future defects and events by express agreement, Fountain v. Hagan Gas Engine & Mfg. Co., 78 S. E. 423 (Ga. 1913); Franklin Mfg. Co. v. Lamson Mfg. Co., 189 Mass. 344, 75 N. E. 624 (1905); Scott v. Keeth, 116 N. W. 183 (Mich. 1908), or where representations as to future defects and events necessarily carry with them a representation as to a present condition. Aultman v. Weber, 28 Ill. App. 91 (1888); Landreth v. Wyckoff, 73 N. Y. S. 388 (1901); Huntingdon v. Lombard, 22 Wash. 202, 60 Pac. 414 (1900). Where machinery is warranted to produce a certain quantity at a specified rate, there being no time limit set, the warranty has been construed to extend over a reasonable period. Danville Coal & Ice Co. v. Vilter Mfg. Co., 25 Ky. Law 1974, 79 S. W. 225 (1904); Sprout, Waldron & Co. v. Hunter, 30 Ky. Law 380 (1907). A warranty of soundness of animals relates to their condition at the time of sale, and covers any unsoundness then existing, though it may not become manifest until such subsequent time as is necessary in the prog-

ress of the disease, to produce its effects. Stevens v. Glover, 14 Ga. App. 540 (1914); Kenner v. Harding, 85 Ill. 264 (1877); McCann v. Ullman, 109 Wis. 574 (1901).

SALES—RESCISSION—CONCEALMENT OF INSOLVENCY—A purchaser of goods, who had no reasonable expectation of being able to pay, failed to disclose his financial condition to the seller. *Held:* The seller could rescind the sale. Parker-Blake Co. v. Ladd, 70 So. 188 (Ala. 1915).

The law is well settled that mere non-disclosure of insolvency is not of itself sufficient to render a sale voidable. Lumber Co. v. Hubbell, 143 N. Y. App. 317 (1911); Stein v. Hill, 100 Mo. App. 38 (1903); Tailor Co. v. Appenzellar, 42 Pa. Super. Ct. 414 (1910). It is also generally accepted that where the purchaser intends not to pay for the goods, the seller may rescind the sale. *In re* Marks & Co., 134 C. C. A. 253 (1914); Trading Co. v. Skinner, 105 N. E. 784 (Ind. 1914). Pennsylvania alone requires a false representation in addition to an intention not to pay. Smith v. Smith, 21 Pa. 367 (1853); Bughman v. Bank, 159 Pa. 94 (1893). A failure to disclose insolvency where there is no reasonable expectation to pay has been held tantamount to an intent not to pay and to afford ground for rescission. Skinner v. Hoop Co., 119 Mich. 467 (1899); Maxwell v. Brown Shoe Co., 114 Ala. 304 (1897). See also Richardson v. Vick, 145 S. W. 174 (Tenn. 1910).

SURETYSHIP—HUSBAND AND WIFE—A wife borrowed money from her husband's debtor and returned it in payment of her husband's debt. *Held:* Although she became nominally the principal debtor on a new obligation, yet she was a surety for her husband's debt and as such was not liable. Staples v. City Bank and Trust Co., 70 So. 115 (Ala. 1915).

By statute a married woman may not become surety for her husband in most jurisdictions. Harbaugh v. Tanner, 71 N. E. 145 (Ind. 1904); Russell v. Rice, 44 S. W. 110 (Ky. 1898); Hazleton Nat. Bank v. Kintz, 24 Pa. Super. 456 (1904). So also in a few states by decision. Feather v. Feather's Estate, 74 N. W. 524 (Mich. 1898). But she may become surety for her husband in those jurisdictions which have by statute removed the common law disability of a wife to contract. Grandy v. Campbell, 78 Mo. App. 502 (1899); Cooper v. Bank of Indian Territory, 46 Pac. 475 (Okla. 1896). Also in a few jurisdictions a contract of suretyship is binding on a married woman when made on the credit of her separate estate. McKell v. Merchants' Nat. Bank, 87 N. W. 317 (Neb. 1901). The question whether a married woman is principal or surety in an obligation to which her husband is a party is to be solved by inquiring whether she received the benefit of the consideration on which the contract rested. Leschen v. Grey, 48 N. E. 344 (Ind. 1897); Hines & Co. v. Hays, 82 S. W. 1007 (Ky. 1904); Sibley v. Robertson, 212 Pa. 24 (1905). Some states by statute allow a married woman to become a surety for a third person. Warder, Bushnell & Glessner Co. v. Stewart, 36 Atl. 88 (Del. 1896); Hart v. Grigsby, 77 Ky. 542 (1879). Others allow it if the husband consents. Hollingsworth v. Spanier, 32 La. Ann. 203 (1880); Union Nat. Bank v. Chapman, 39 N. Y. Supp. 1051 (1896).

TORTS—ANIMALS—RIGHT TO KILL A DOG—The father of a child bitten by a dog, suspecting that it was mad, upon the refusal of the owner to sell it, broke into the owner's house, killed the dog, which was tied therein, and took its head to send to the Pasteur Institute for examination. *Held:* The father was liable. Allen v. Camp, 70 So. 290 (Ala. 1915).

In addition to the rather obvious right of one attached by a dog to kill it in self-defense, Credit v. Brown, 10 Johns 365 (N. Y. 1813), it has been held that a ferocious dog, accustomed to bite mankind, is a common nuisance and if found at large may be destroyed by anyone. Woolf v. Chalker, 31 Conn. 121 (1862). In Pennsylvania it was held at an early date that one bitten by a mad dog might kill it even at a later time, as a nuisance. Bowers v. Fitzrandolph, Add. 214 (Pa. 1794). A dog merely trespassing, however, may not be killed unless actually doing injury to person or property. Reed v. Goldneck, 112 Mo. App. 310 (1905); and this is true though the owner has been notified to keep it off one's premises. Hodges v. Causey, 77 Miss. 353 (1899). It is held quite generally, either by statute or by decision, that a sheep-killing dog may be killed without liability. Throne v. Mead, 122 Mich. 273 (1899). The principal case appears to be the first in which this humanitarian justification has been offered for such a killing and under its facts appears to establish a distinct precedent. These circumstances were admitted by the court in mitigation of damages only.

TRIALS—IMPROPER REMARKS OF COUNSEL—In an action by a domestic servant to the case. Thus appeals to race or local prejudice are improper, counsel that the jury should give her what they would want their mother or sister to have under like circumstances, was improper. Gungrich v. Anderson, 155 N. W. 379 (Mich. 1915).

It is the right of counsel to indulge in all fair argument in favor of his client, but he is outside of his right when he appeals to prejudice irrelevant to the case. Thus appeals to race or local prejudice are improper. Garritty v. Rankin, 55 S. W. 367 (Tex. 1900); appeals to prejudice against corporations are improper, Whipple v. Michigan R. Co., 143 Mich. 41 (1906); likewise, reference to wealth or poverty of the parties, Birmingham Co. v. Gonzalez, 183 Ala. 273 (1913); White v. Chicago Ry., 145 Iowa 408 (1910); U. S. Cement Co. v. Cooper, 172 Ind. 599 (1909); or reference to the forlorn or helpless condition of the parties. Appel v. Chicago Ry. Co., 250 Ill. 561 (1913); Texas Ry. Co. v. Pledger, 36 Tex. Civ. App. 248 (1904). It is the duty of the court to keep impassioned oratory within the limits of the record. Haake v. Milling Co., 168 Mo. App. 177 (1913). Where the argument of counsel is calculated to arouse the passions and prejudice of a jury by presenting to them considerations extraneous to the evidence, this is ground for reversal. Chicago, *etc.*, R. Co. v. Rowell, 151 Ky. 313 (1912); Englund v. Traction Co., 139 Ill. App. 572 (1908). So a statement that every father, mother and business man was watching the suit was improper. Citizens' Bank v. Insurance Co., 86 Vt. 267 (1912). In an action for injuries received from an automobile, the argument of counsel asking a verdict in order to protect the lives of citizens on the highway and to warn

drivers, was not within the range of legitimate argument. Weil v. Hagan, 161 Ky. 292 (1915). And an argument that there is no recompense that can in any way compensate a parent for the loss of a child, is improper. Duke v. St. Louis, *etc.*, Ry., 172 Fed. 684 (1909); Chicago City Ry. v. Math, 114 Ill. App. 350 (1904). Even though arguments may be likely to excite the prejudice of a jury, they are not improper if predicated on the evidence. Burton v. Kansas City, 181 Mo. App. 427 (1914); Mahoney v. Goldblatt, 163 Ill. App. 563 (1912). An interrogation whether the jury "would fall into a sewer for that sum and go through life that way, or have their son go through life that way," was improper, Morrison v. Carpenter, 179 Mich. 207 (1914); or an argument that the jury should allow such damages as they would take or as would compensate them, had they been injured, Southwestern Tele. Co. v. Anderson, 169 S. W. 218 (Tex. 1914); Wells v. Ann Arbor R. Co., 150 N. W. 340 (Mich 1915); but see Adams Exp. Co. v. Aldridge, 20 Colo. App. 74 (1904), *contra.*

In Pennsylvania the practice in such cases where counsel makes an improper argument is to withdraw a juror and continue the case. Saxton v. Pittsburg Ry., 219 Pa. 492 (1908). But this question is within the sound discretion of the trial judge. Shaffer v. Coleman, 35 Pa. Super. 386 (1908).

TRUSTS—EXECUTION BY TRUSTEE—EFFECT OF RELEASE BY BENEFICIARY—A trust for the grantor's son called for an absolute conveyance in fee upon the son attaining majority. At the father's suggestion the trustee conveyed only a life estate and obtained a formal confirmation of the transaction from the *cestui que trust. Held:* The release could not be binding on the beneficiary because of improper consideration and the effect of the conveyance was to pass to the beneficiary the entire estate contemplated by the terms of the trust deed. McPike v. McPike, 181 S. W. 2 (Mo. 1915).

While it is clear that the *cestui que trust* may give a release or formal confirmation to the trustee, Pope v. Farnsworth, 146 Mass. 339 (1888), it is equally a well settled rule that the courts will closely scrutinize such agreements. Richardson's Adm'rs v. Spencer, 57 Ky. 450 (1857), and the burden of proof that the transaction was a righteous one is placed upon the trustee. Allen v. Bryant, 42 N. C. 276 (1851); Appeal of Wistar, 54 Pa. 60 (1866). It has been held that the beneficiary must contract with full knowledge of the circumstances. Boyd v. Hawkins, 17 N. C. 195 (1882); Jones v. Lloyd, 117 Ill. 597 (1886), and also that the *cestui que trust* must know the law and what his legal rights are. Saunders v. Richard, 35 Fla. 28 (1895). In the principal case the court intimated the father's presence and his wishes were undue influence. It has been held that this element as well as fear of the trustee must not be present. Barnard v. Stone, 159 Mass. 224 (1893). If the beneficiary has just come of age, as in the principal case, he ought to have proper legal advice. Kirby v. Taylor, 6 Johns Ch. 242 (N. Y. 1822); Stanley's App. 8 Pa. 431 (1848).

WILLS—LEGACIES—SATISFACTION OF CLAIMS—A testator acquired a tract of land, part of the purchase price having been borrowed from his wife,

which land he devised to his wife in fee together with life estates in other tracts. *Held:* The devise was a satisfaction of the wife's debt. Whitaker v. Whitaker, 179 S. W. 584 (Ky. 1915).

It is a familiar doctrine in equity that if one, who is indebted to another, by his will gives that other a sum of money equal to or greater than the debt, a presumption arises that such gift was intended as a satisfaction of the debt. Atkinson v. Littlewood, L. R. 18 Eq. 595 (Eng. 1872); Allen v. Merwin, 121 Mass. 378 (1876). However, in many cases such a rule fails to give effect to the true intention of the testator and for this reason it is not favored by courts of equity. Edelen v. Dent, 2 Gill and J. 185 (Md. 1830). Because of the strong leaning of the courts away from this doctrine a large number of exceptions have grown up which prevent its application in many instances. For example, the presumption of satisfaction does not arise where the legacy is of a different nature than the debt, hence a gift by will of lands or specific chattels is not a satisfaction of a pecuniary obligation. Smith v. Marshall, 1 Root 159 (Conn. 1790); Partridge v. Partridge, 2 Har. and J. 63 (Md. 1807). This exception seems to have been disregarded in the principal case on the ground that it would not give effect to the testator's intention. Nor does the presumption arise where the debt is uncertain or contingent, or where the payment of the legacy is made to depend upon a contingency. Homer v. McGaughy, 62 Pa. 189 (1869): Gilman v. Brown, 43 Miss. 641 (1870). Likewise, where the testator by his will directs that *debts and legacies* shall be paid, it is well settled that this shows an intention that both should be paid and overcomes the presumption of satisfaction. Hassel v. Hawkins, 4 Drew. 468 (Eng. 1859); Strong v. Williams, 12 Mass. 389 (1815); and it has been decided that the same result will be reached if debts alone are directed to be paid. Glover v. Hardcup, 34 Beav. 74 (Eng. 1864); Cloud v. Clinkenbeard, 8 B. Mon. 397 (Ky. 1848). If the amount of the legacy is less than the debt there is no presumption of satisfaction *pro tanto*. Atkinson v. Webb, 2 Vern. 478 (Eng. 1704); Eaton v. Benton, 2 Hill 576 (1842); see also Cloud v. Clinkinbeard, *supra*. Finally, a further exception to the general rule will be found in those cases where the legacy is payable at a time different than the date at which the debt becomes payable. Van Riper v. Van Riper, 2 N. J. Eq. 1 (1838); Byrne v. Byrne, 3 S. & R. 54 (Pa. 1817).

Where a father or person standing *in loco parentis* to the legatee owes a debt to the legatee, the case is governed in every respect by the same rules as though the father and child were strangers to each other. Tolson v. Collins, 4 Ves. 483 (Eng. 1799); although the question of such relation is highly important in cases of satisfaction of legacies by advancements. *Ex parte* Pye, 18 Ves. 151 (Eng. 1811). With regard to legacies from a creditor to a debtor there is no presumption either in favor of or against satisfaction of the debt owing the testator, and this is true whether the legacy is equal to or is greater or smaller than the debt. Sharp v. Whitman, 205 Pa. 285 (1903); Irvine v. Palmer, 91 Tenn. 463 (1892).

WILLS—TESTAMENTARY CAPACITY—PRESUMPTION—The testatrix disinherited her only son and the will was controverted on the grounds of lack

of testamentary capacity. *Held:* An unnatural disposition is a factor which the jury may consider in connection with other evidence in probing the testatrix's sanity, but this alone will not justify a presumption of incapacity. Breadheft v. Cleveland, 110 N. E. 662 (Ind. 1915).

The well-settled rule is that an unnatural disposition of a testator's estate is evidence which may be considered in judging his testamentary capacity. Donan v. Donan, 236 Ill. 341 (1908); Barker v. Comnis, 110 Mass. 477 (1872). But it is equally well settled that disinheritance of a natural heir without further evidence is not enough to establish lack of testamentary capacity. Graham v. Deuterman, 206 Ill. 378 (1903). It has been held that to hold otherwise would deprive the testator of the right to dispose as he sees fit. Zimlich v. Zimlich, 90 Ky. 657 (1890). The testator may have a prejudice, and whether just or unjust, it is not for review by the jury. Donan v. Donan, *supra*; *Re* Cary, 56 Colo. 77 (1913); and it has been held that once a prejudice is revealed it robs the unnatural distribution of all weight as evidence of mental incapacity. *In re* Morgan, 219 Pa. 355 (1908).

The more difficult task for a jury is to determine first whether the disinheritance can be classed as unnatural. It has been held that the disinheritance of the testator's children is *prima facie* an unnatural and unreasonable act. Hardenburgh v. Hardenburgh, 133 Ia. 1 (1906). But the better view is to determine it from all the circumstances—the relations which existed between the testator on the one hand and the persons disinherited and the legatees on the other. Cheney v. Gold, 225 Ill. 394 (1907). It has been held the extent of the estate, the pecuniary condition of the beneficiaries, as well as those who present alleged natural claims, should be considered. Stubbs v. Houston, 33 Ala. 555 (1858).

WILLS—WITNESSES—SIGNING IN TESTATOR'S PRESENCE—Witnesses to the will of a blind man signed it in the same room and about four feet away from him. The question was whether this was a signing "in the presence" of the testator, as required by statute. *Held:* Since the testator was fully conscious of what was going on by means of his other senses, this constituted a sufficient signing "in his presence." *In re* Allred's Will, 86 S. E. 1047 (N. C. 1915).

The statute of 1 Vict. c. 26, s. 9, and most of the American statutes, requires the witnesses of a will to sign "in the presence" of the testator. It is not necessary that the testator actually see the signing, if it is in his presence; otherwise no blind person could make a valid will under such a statute. Turner v. Cook, 36 Ind. 129 (1871); Riggs v. Riggs, 135 Mass. 238 (1883); Ray v. Hill, 3 Strob. 297 (S. C. 1848). In the same room is "in his presence." *In re* Howard's Will, 17 Am. Dec. 60 (Ky. 1827). In an adjoining room, but out of sight, is generally held not to satisfy the statute. Boldry v. Parris, 56 Mass. 433 (1848); Mandeville v. Parker, 31 N. J. Eq. 242 (1879). But if the testator could see the witnesses, the statute is fulfilled. Drury v. Connell, 177 Ill. 43 (1898); Hopkins v. Wheeler, 21 R. I. 533 (1900). It has also been held that the testator must be in a position to see the paper as well as the witnesses. Burney v. Allen, 125 N. C. 314 (1899).

Some states do not have this requirement in the statutes. Herrick v. Snyder, 59 N. Y. S. 229 (1899), 1 Consol. Laws of N. Y., p. 511, § 21-4; Irvine's Estate, 206 Pa. 1 (1903), Act of Apr. 8, 1833, P. L. 249, § 6. See also 1 Underhill: Wills, § 196; Williams: Executors, p. 62 ff.; 1 Jarman: Wills, p. 118 ff.